

1 **RICHARD A. SMITH, WSBA 15127**  
2 **SMITH LAW FIRM**  
3 314 No. Second Street  
4 Yakima, WA 98901  
5 Telephone: 509-457-5108

6 **Attorney for Defendant**  
7 Donovan Cloud

8  
9 **IN THE UNITED STATES DISTRICT COURT**  
10 **FOR THE EASTERN DISTRICT OF WASHINGTON**  
11 **(Honorable Salvador Mendoza, Jr.)**

12  
13 UNITED STATES OF AMERICA,  
14 Plaintiff,

15 vs.

16  
17 DONOVAN CLOUD,  
18 Defendant.

13 ) NO. 1:19-CR-02032-SMJ-2

15 ) MOTION *IN LIMINE* AND REQUEST  
16 ) ADDITIONAL TIME TO REQUEST  
17 ) A *DAUBERT* HEARING

18 ) DATE: October 8, 2019  
19 ) TIME: 8:30 a.m.

20  
21  
22 **TO: Clerk of U.S. District Court, Eastern District of Washington**  
23 **TO: Thomas J. Hanlon, Assistant United States Attorney**

24 **COMES NOW DONOVAN CLOUD** by and through his attorney of record,  
25 Richard A. Smith of *Smith Law Firm*, and moves the court *in limine* and requests  
26 additional time to determine whether a *Daubert* hearing is appropriate or necessary.  
27

28  
29  
30 MOTION *IN LIMINE* AND REQUEST FOR  
31 ADDITIONAL TIME TO REQUEST A *DAUBERT*  
HEARING - Page 1

**SMITH LAW FIRM**  
314 North Second Street  
Yakima, WA 98901  
(509) 457-5108

1 This motion is made based upon the Memorandum of Points and Authorities  
2 submitted with this motion and the Federal Rules of Evidence 401, 403, 701, 702 and  
3 Federal Rule of Criminal Procedure 16(a)(1)(G).

4 DATED this 10th day of September, 2019.

5 Presented by:

6 /s/ Richard A. Smith

7 RICHARD A. SMITH, WSBA 15127

8 Attorney for Defendant Donovan Cloud

9 314 North Second Street

10 Yakima, WA 98901

11 rasmith@house314.com

12 smithone@house314.com

13 Phone: (509) 457-5108

14 Fax: (509) 452-4601

15  
16 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**  
17 **MOTION *IN LIMINE* AND REQUEST FOR ADDITIONAL TIME TO**  
18 **REQUEST A *DAUBERT* HEARING**

19  
20 **1. Request for Additional Time to Determine if a *Daubert* Hearing is**  
21 **Appropriate or Necessary.**

22 Defense Counsel has received laboratory reports regarding DNA testing and  
23 fingerprint comparison in discovery. In addition, Defense Counsel has received in  
24 discovery regarding a K-9 tracking dog and its participation in this investigation. In  
25 response to the materials previously received counsel has requested additional  
26 discovery pursuant to case law and Federal Rule of Criminal Procedure 16(A)(1)(G).  
27 The additional discovery requested is needed to determine whether a *Daubert* hearing  
28 is appropriate or necessary. Defense Counsel is unable to request a *Daubert* hearing

29 MOTION *IN LIMINE* AND REQUEST FOR  
30 ADDITIONAL TIME TO REQUEST A *DAUBERT*  
31 HEARING - Page 2

**SMITH LAW FIRM**  
314 North Second Street  
Yakima, WA 98901  
(509) 457-5108

1 at this time based upon the discovery currently provided by the Government.  
2 Consequently, counsel requests a continuance of the time set by the Case  
3 Management Order [ECF 79] to request a *Daubert* hearing.

4 **2. Impermissible “Overview Testimony”.**

5 It is not uncommon for the government to attempt to elicit testimony from  
6 testifying police officers, explaining why they targeted their investigation on the  
7 defendant. Mr. Cloud asks that, should such introductory comments be sought in this  
8 case, the witnesses be ordered not to testify as to the contents of out-of-court hearsay  
9 statements or other inadmissible evidence outside of their personal knowledge. Such  
10 “overview testimony” would violate Rule 801 of the Federal Rules of Evidence and  
11 the Sixth Amendment’s Confrontation Clause. *United States v. Flores-De-Jesus*, 569  
12 F.3d 8 (1<sup>st</sup> Cir. 2009); *United States v. Garcia-Morales*, 382 F.3d 12, 17 (1<sup>st</sup> Cir. 2004)  
13 (“Hearsay does not become admissible merely because it is provided by a government  
14 agent in the form of an overview of the evidence”); *United States v. Griffin*, 324 F.3d  
15 330, 349 (5<sup>th</sup> Cir. 2003) (“We unequivocally condemn this practice as a tool used by  
16 the government to paint a picture of guilt before the evidence has been introduced”).  
17 Furthermore, when a government agent testifies not as to his or her personal  
18 knowledge, but as to conclusions or opinions drawn about an overall investigation  
19 (such as who was involved or what roles were played), the testimony becomes  
20 impermissible vouching. *United States v. Garcia*, 413 F.3d 201, 214 (2<sup>nd</sup> Cir. 2005) (  
21 “We ... condemn the practice of having a case agent offer a summary opinion as to  
22 culpability before any evidence to support such a conclusion has been presented for  
23 jury review”). *United States v. Cases*, 356 F.3d 104, 120 (1<sup>st</sup> Cir. 2004) (“Overview  
24 testimony by government agents is especially problematic because juries may place  
25 greater weight on evidence perceived to have the imprimatur of the government”).  
26  
27  
28  
29

1 This fundamental problem with “overview testimony” persists, regardless of whether  
2 the sources of the testimony eventually testify, thus eliminating confrontation  
3 problems. *United States v. Flores-De-Jesus*, 569 F.3d 8, 17-18 (1<sup>st</sup> Cir. 2009).  
4 Accordingly, Mr. Cloud asks that overview testimony be prohibited altogether,  
5 regardless of when a particular witness testifies or whether the witness’s testimony is  
6 corroborated by that of other percipient witnesses.

7  
8 **3. The Court should prohibit statements made by any indicted or unindicted**  
9 **co-conspirator or accomplice which directly or indirectly refer to Donovan**  
10 **Cloud unless or until the Court has determined the admissibility of any**  
11 **statement outside the presence of the jury.**

12 Statements of co-conspirators are admissible if they were made “by the parties  
13 co-conspirator during and in furtherance of the conspiracy”.

14 Mr. Cloud objects to the admission of any statement alleged to be made against  
15 him or implicating him under the co-conspirator rule until it is determined that any  
16 proposed statement meets the requirements of FRE 801(d)(2). The Defendant objects  
17 to admission of statements against him under the co-conspirator hearsay rule if (1) the  
18 statements are idle chatter or otherwise cannot be regarded in furtherance of a  
19 conspiracy; (2) made before the conspiracy was formed or after the conspiracy ended;  
20 (3) was made by a co-conspirator to law enforcement before or after the arrest of the  
21 maker of the statement; and (4) if the statement is self-serving by accomplices and  
22 potential conspirators who are receiving benefits or consideration in exchange for  
23 their testimony against Mr. Cloud. These statements are inherently unreliable and  
24 must be tested and excluded under FRE 403. Mr. Cloud requests that the Government  
25 be required to identify statements it intends to introduce under FRE 801(d)(2)(E) at or  
26 before the pre-trial conference so that the Court can determine admissibility outside  
27 the presence of the jury.  
28

1 **4. Opinion testimony by any person who has not been previously identified**  
2 **as an expert and who the Government has failed to previously provide**  
3 **discovery pursuant to FRCrP 16(a)(1)(G).**

4 Federal Rule of Criminal Procedure 16(a)(1)(G) provides in part as follows:

5 G. Expert witnesses – At the defendant’s request, the government  
6 must give to the defendant a written summary of any testimony that  
7 the government intends to use under Rule 702, 703, or 705 of the  
8 Federal Rules of Evidence during its case-in-chief at trial ...

9 The summary provided under this paragraph must describe the  
10 witnesses’ opinions, the basis and reasons for those opinions, and the  
11 witnesses’ qualifications.

12 Mr. Cloud requests the Court prohibit any opinion testimony by any person who has  
13 not previously been identified as an expert and/or who the Government has failed to  
14 provide discovery pursuant to FRCrP 16(a)(1)(G) at or before the time that pre-trial  
15 motions are due pursuant to the Case Management Order [ECF 79].

16  
17 **5. Testifying witnesses should be excluded from the courtroom under FRE**  
18 **615.**

19 The Defendant requests that all witnesses be excluded from the courtroom until  
20 they are excused from service, pursuant to FRE 615. Should the law enforcement  
21 agent, chosen by the Government to sit at counsel’s table during the trial, be a  
22 percipient witness, the Defendant would ask that the case agent’s testimony be taken  
23 first, so as not to violate the spirit of FRE 615. See *United States v. Valencia-Riascos*,  
24 696 F.3d 938 (9<sup>th</sup> Cir. 2012) (“good practice to require case agent witnesses to testify  
25 first”).  
26

27 ///  
28  
29

6. **Leave to file additional motions *in limine*.**

The Defense hereby reserves the right to file additional motions *in limine* should the need arise prior to the trial.

DATED this 10th day of September, 2019.

Presented by:

/s/ Richard A. Smith

RICHARD A. SMITH, WSBA 15127

Attorney for Defendant Donovan Cloud

314 North Second Street

Yakima, WA 98901

rasmith@house314.com

smithone@house314.com

Phone: (509) 457-5108

Fax: (509) 452-4601

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury of the laws of the State of Washington that on September 10, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

Thomas J. Hanlon, Assistant United States Attorney.

/s/ Lugene M. Borba

LUGENE M. BORBA

Legal Assistant, Smith Law Firm